IN THE HIGH CUORT OF PUNJAB & HARYANA AT CHANDIGARH

S.A.O. NO.35 of 2003
Date of decision: November 1,2006

Jai Ram etc. V. Bhajo

CORAM; HON'BLE MR.JUSTICE VINEY MITTAL

Present: Shri Sanjiv Sharma, Advocate, for the appellants.
Shri H.S. Dhandi,Advocate,for the respondent.

Viney Mittal,J.

The present appeal has been filed by the defendants. They have challenged an order dated May 7, 2003 passed by the learned Additional District Judge, Patiala whereby an application filed by the defendants(respondents before the appellate Court) under Order 9 Rule 13 of the Code of Civil Procedure for setting aside the exparte judgment and decree dated March 20,2002 has been dismissed.

The facts which emerge from the record show that a suit for declaration and some consequential reliefs was filed by the plaintiff, Smt. Bhajo. She challenged the validity of the sale deed dated November 30,1988 and claimed that the said sale deed was a result of forgery and fraud. After a contest was offered by the defendants and on conclusion of the proceedings in the trial, the learned trial Judge dismissed the suit filed by the plaintiff vide its judgment and decree dated January 18,1998.

Plaintiff, Smt. Bhajo filed an appeal before the first appellate Court. In the meantime, defendants had shifted from their original address i.e. Village Ram Nagar, Tehsil Rajpura, District Patiala to Village Nagla Jagir, Tehsil Jagadhri, District Yamunanagar (Haryana).During the course of proceedings before the appellate

court, the said defendant-respondents remained unserved , in the ordinary way. The appellate court ordered the service of the aforesaid defendant-respondents, by way of registered covers. Even the registered covers sent for the service of the defendant-respondents, were received back by the appellate court, with the report that the said defendant-respondents were not living in Village Ram Nagar and had shifted to some other place. It appears that in spite of the aforesaid report, the appellate court chose to direct that the said respondents be served through substituted service i.e. by munadi and affixation in Village Ram Nagar itself. After the aforesaid affixation and munadi in village Ram Nagar, no one appeared on behalf of the aforesaid defendant-respondents. Consequently, they were ordered to be proceeded against exparte. Subsequently, vide judgment dated March 20,2002, the appeal filed by the plaintiff was allowed and her suit was decreed.

Later on an application was filed by the defendants for setting aside the aforesaid exparte judgment and decree. It was maintained by the said defendants, that they had already left Village Ram Nagar in the year 1986 and had started living in Village Nagla Jagir,Tehsil Jagadhri District Yamuna Nagar (Haryana) and had never been served in the proceedings of the first appeal. They also claimed that they had never received any registered cover notices and rather the said notices had been returned back to the court as unserved. The defendant-respondents also maintained that they had no knowledge of the affixation and munadi conducted in village Ram Nagar. Consequently the defendants prayed that the exparte judgment and decree dated March 20,2002 passed by the appellate Court be set aside.

The aforesaid application filed by the defendant-

respondents was contested by the plaintiff, Smt.Bhajo. She defended the exparte judgment and decree. The learned appellate Court, although found that there was no due service on the said defendant-respondents and there were sufficient grounds to set aside the exparte judgment and decree, but still dismissed the application filed by the applicant-defendants, holding the same to be barred by limitation.

It is, in these circumstances, that the defendants are in present appeal before this court.

I have heard Shri Sanjiv Sharma,learned counsel appearing for the appellants and Shri H.S.Dhandi, learned counsel appearing for the plaintiff-respondent and with their assistance have also gone through the record of the case.

It is apparent from the perusal of the findings recorded by the learned appellate Court itself in para 13 of its order that no service of the proceedings in the first appeal was ever effected upon the defendants. It has also been held by the appellate court that the said defendants at the time of proceedings in the first appeal, were living in Haryana and even the registered covers sent at their Ram Nagar address had been received back unserved with a report that the defendants were living at some other place. The appellate Court has also observed that in these circumstances when the munadi was conducted at Ram Nagar, the defendants had no knowledge of the same. Consequently, it has been held that there were sufficient grounds to set aside the exparte judgment and decree. However even after returning the aforesaid findings the appellate court has held that since the applicant-defendants had knowledge of the exparte judgment and decree in the month of March,2002, therefore the application filed by them in September, 2002 for setting aside

the judgment and decree was barred by limitation.

In my considered view, the aforesaid order passed by the appellate court cannot be sustained.

Firstly, there is no warrant for the finding that the applicant-defendants had knowledge of the exparte decree in March,2002. Merely because Jai Singh, applicant, has stated that he had come to know of the decree when he had gone to attend the marriage of his cousin in Village Ram Nagar in March,2002, cannot be treated to be any admission of the fact that the said applicant-defendant had any knowledge of the decree. A stray line uttered in the cross-examination of the said witness cannot be treated to be sufficient to come to a finding of the knowledge of the decree to the defendants in March,2002. Consequently, it has to be held that, as appellate court has itself observed that the proceedings in the appeal were conducted without any service on the defendants and that they had already shifted to a village in Haryana, when the proceedings in the appeal were being conducted , from Punjab, then it cannot be taken that the decree which has been passed without any due service on the defendants, could still be treated to be legal and valid. In my considered view the said decree was liable to be treated as a nullity.

Another fact which has been lost sight of by the appellate court is that the plaintiff had lost in her suit before the trial court. She had filed the first appeal. The defendants who had won in the proceeding before the trial Court had nothing to gain by not appearing in the proceedings in the first appeal. In these circumstances, even if it be taken that there was some negligence on the part of the defendants in filing the application for setting aside the exparte decree,after some delay, the plaintiff could always be

compensated with costs. It is well settled that rights of the parties should be decided by the court on merits and substantial justice should be done after affording a fair opportunity to all the parties. Any technical approach, which would defeat the cause of justice should be avoided.

Consequently, the present appeal is allowed. Order dated May 7,2003 passed by the learned Additional District, Patiala is set aside. As a result thereof, the judgment and decree dated March 20,2002 passed by the learned first appellate court is also set aside subject to payment of Rs.10,000/- as costs. The aforesaid costs shall be payable by the defendants to the plaintiff, on a date to be fixed by the learned first appellate Court, for the aforesaid purpose.

The parties through their learned counsel are directed to appear before the learned first appellate court on December 11,2006.

Since, on account of the proceedings having remained pending before the first appellate court and also on account of the present appeal having remained pending before this court for considerable time, sufficient delay has already occurred, the first appellate court is directed to decide the main appeal within six months of the appearance of the parties.

A copy of the order be given dasti on payment of charges for the urgent copies.

November 1,2006 (Viney Mittal)
sks Judge